United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

OCTOBER TERM, 1909.

No. 2081. 679

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION, APPELLANT,

vs.

JULIA FITZGERALD.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED OCTOBER 23, 1909.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1909.

No. 2081.

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION, APPELLANT,

vs.

JULIA FITZGERALD, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 25, 1909.

In the Court of Appeals of the District of Columbia.

No. 2081.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant,
vs.
JULIA FITZGERALD.

a Supreme Court of the District of Columbia.

At Law. No. 50108.

JULIA FITZGERALD, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill of Particulars.*

Filed January 6, 1908.

In Justice's Court of the District of Columbia.

Sub-District No. 2.

50108.

JULIA FITZGERALD, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

August 31, 1907.—Damages caused by the negligence of the defendant on First Street Northeast between "M" and "N" Streets, Washington, D. C., as follows:

Injury to plaintiff's mare and loss occasioned by same....	$165.00
Hospital bill for care of said mare August 31 to October 5, 1907	43.00
Damage to plaintiff's wagon.....	88.00
Total.....	$296.00

P. R. HILLIARD,
Attorney for Plaintiff.

Dec. 4-11.

2 *Summons.*

Filed January 6, 1908.

Sam'l C. Mills, J. P., Sub-District No. 2, 1205 G Street N. W.

In Justice's Court of the District of Columbia.

50108.

No. 12690.

JULIA FITZGERALD, Plaintiff,
vs.
BALTIMORE & OHIO RAILROAD CO., INC., Defendant.

The President of the United States to the defendants above named, Greeting:

You are hereby summoned to appear in this Court on the 4th day of December, A. D. 1907, at 11 o'clock A. M., to answer the plaintiff's suit against you for $296.00.

Given under my hand and seal this 25th day of November, A. D. 1907.

SAM'L C. MILLS, [SEAL.]
Justice of the Peace.

Marshal's Return.

WASHINGTON, D. C., *Nov.* 25", 1907.

Summoned as within directed: By leaving a copy with S. B. Hege, Dist. Pass'r Agt.

AULICK PALMER,
U. S. Marshal,
By J. A. WATTS,
Deputy Marshal.

3 (Endorsed.)

WASHINGTON, D. C., *Dec.* 17, 1907.

Parties appeared trial had and after argument Judgment for Defendant Plaintiff to pay costs Def'd'ts with $3.40 cost.

S. C. MILLS, *J. P.* [SEAL.]

Notice of Appeal.

Filed January 6, 1908.

In Justice's Court of the District of Columbia.

Sub-District No. 2.

50108.

No. 12690.

JULIA FITZGERALD, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

To Messrs. Hamilton & Brady, Attorneys for Defendant:

You are hereby notified that I this 17th day of December, A. D. 1907, note an appeal from the judgment rendered in the above-entitled cause, and that I shall on the 23rd day of December, A. D. 1907, at the hour of 10 o'clock A. M., at the office of said Justice, offer Patrick Breen Residence No. 512 First street, N. W.,
4 Washington, D. C., as surety on the undertaking to be entered into herein.

P. R. HILLIARD,
Attorney for Plaintiff.

(Endorsed.)

DISTRICT OF COLUMBIA, *To wit:*

I, Patrick R. Hilliard, on oath, depose and say, that on the — day of December, A. D. 1907, I served a true copy of the within notice on John J. Hamilton one of the Attorneys for Defendant.

PATRICK R. HILLIARD.

Sworn to and subscribed before me this 17th day of December, A. D. 1907.

——— ———, *J. P.* [SEAL.]

* * * * * * *

To Messrs. Hamilton & Brady, Attorneys for Defendant:

You are hereby notified that I this 17th day of December, A. D. 1907, note an appeal from the judgment rendered in the above-entitled cause, and that I shall on the 23rd day of December, A. D. 1907, at the hour of ten o'clock A. M., at the office of said Justice, offer William H. McGrann, Residence No. 49 "M" street, N. W., Washington, D. C., as surety on the undertaking to be entered into herein.

P. R. HILLIARD,
Attorney for Plaintiff.

5 (Endorsed.)

DISTRICT OF COLUMBIA, *To wit:*

I, Patrick R. Hilliard, on oath, depose and say, that on the 18th day of December, A. D. 1907, I served a true copy of the within notice on Edmund Brady one of the Attorneys for the Defendant.

PATRICK R. HILLIARD.

Sworn to and subscribed before me this 18th day of December, A. D. 1907.

——— ———, *J. P.* [SEAL.]

Undertaking on Appeal.

Filed January 6, 1908.

In Justice's Court of the District of Columbia.

Sub-District No. 2.

50108.

No. 12690.

JULIA FITZGERALD, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

The plaintiff desiring to appeal from the judgment rendered against her in the above-entitled cause, on the 17th day of December, 1907, to the Supreme Court of the District of Columbia
6 she and William H. McGrann her surety hereby appearing and submitting to the jurisdiction of the said Supreme Court, undertake, jointly and severally, to satisfy and pay whatever final judgment may be recovered in the said Court, against said Julia Fitzgerald, which judgment they agree may be entered against them jointly, or either of them separately in this case.

Given under our hands this 23rd day of December, 1907.

JULIA FITZGERALD. [SEAL.]
WILLIAM H. McGRANN. [SEAL.]

Approved Dec. 23d, 1907.

SAM'L C. MILLS,
Justice of the Peace.

Certificate of a Justice of the Peace on Appeal.

Filed January 6, 1908.

In Justice's Court of the District of Columbia.

Before Sam'l C. Mills, a Justice of the Peace.

50108.

No. 12690.

JULIA FITZGERALD, Plaintiff,
vs.
BALTIMORE & OHIO RAILROAD CO., Defendant.

Action for Damages.

For $296.00.

Proceedings.

Date.	
Nov. 25, 1907.	Summons and Copy issued Returnable Dec. 4, 1907 11 a. m.
" 25, "	Returned summoned by leaving a Copy hereof with S. B. Hege, District Passenger Agt. signed Aulick Palmer, U. S. M. by J. A. Watts, Depty.
7	
Dec. 2, 1907.	Subpœna issued by Defendant to J. R. Mead, P. H. Ray, F. Thompson and Michael Hogan.
" 3, "	Returned summoned Aulick Palmer, U. S. M., by C. S. Eskridge, Dpty.
" 3, "	Subpœna issued by Plaintiff to C. Fenald & Wm. Trundall.
" 4, "	Returned summoned Aulick Palmer, U. S. M., by J. A. Watts, Dpty.
Dec. 17, "	Parties appeared trial had, after argument Judgment for Defendant with Costs 7.20.

SAM'L C. MILLS, *J. P.* [SEAL.]

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, Sam'l C. Mills, one of the Justices of the Peace in and for the said County and District, do hereby certify that the foregoing is a true statement from my docket of all the proceedings had before me in the above cause, and that the annexed are all the original papers therein.

Given under my hand and seal this 30th day of December, A. D. 1907.

SAM'L C. MILLS, *J. P.* [SEAL.]

Cost paid by Plaintiff..... $3.80
Cost paid by Defendant..... $3.40

Memorandum.

March 30, 1909.—Verdict for Plaintiff for $164.00.

8 *Opinion.*

Filed April 23, 1909.

Law. No. 50108.

FITZGERALD
VS.
B. & O. RAILROAD CO.

In this case a verdict was returned for the plaintiff, and the defendant has moved for a new trial.

The contention urged in support of the motion for new trial is that the Court erred in instructing the jury that Sec. 16 of Art. 10 of the Police Regulations, known as the Fence Regulation, was in force.

This Regulation was first promulgated on June 15, 1887, and purported to be under and in pursuance of an Act of Congress approved Jan. 26, 1887 (24 Stat. L. 368). A careful reading of this statute of Jan. 26, 1887, however, discloses that no general power to promulgate Police Regulations was given thereby to the District Commissioners, but their power was "specifically restricted to eleven distinct subjects of regulation" (Coughlin v. D. C., 25 App. Cas. (D. C.) 253), and this Fence Regulation did not come within any of the eleven subjects.

Subsequently, however, on Feb. 26, 1892 (27 Stat. L. 394), Congress passed a joint resolution providing that—

"*that* Commissioners of the District of Columbia are hereby authorized and empowered to make and enforce all such reasonable
9 and usual police regulations in addition to those already made under the act of January twenty-sixth, eighteen hundred and eighty-seven, as they may deem necessary for the protection of lives, limbs, health, comfort and quiet of all persons, and the protection of all property in the District of Columbia."

It is contended on behalf of the defendant (and the Court agrees with the contention) that the passage of this joint resolution did not validate the Regulation of June 15, 1887, unless and until said Regulation should be re-promulgated and re-published by the District Commissioners.

From a careful consideration of the events following the passage of this joint resolution, however, it does appear that this Fence Regulation was re-promulgated and re-published. On August 31, 1894, the Commissioners passed an order for the compilation in book form, for the use of the public, of the regulations that they deemed then in force, and the said compilation was duly made, including this Fence Regulation, but no publication was made as required by law to constitute this action a promulgation or re-promulgation of the Fence Regulation, and therefore this action of the District Commissioners could not, of itself, validate the Fence Regulation originally promulgated without authority of law.

But it seems that on June 4, 1895, the District Commissioners passed an order—

"That section 16, article 10, of the Police Regulations in and for the District of Columbia, made August 31, 1894, is hereby amended by the insertion of the word 'roads', so that it will read as follows: (inserting the Fence Regulation with the word *roads* added)

and this order of June 4, 1895, was duly published in that way, containing the full and complete language of the Fence
10 Regulation.

How, therefore, can there be any serious question but that this Fence Regulation became thereafter effective? The District Commissioners thereby promulgated and published this Fence Regulation in its full and complete terms, without the slightest ambiguity as to their intention that the Fence Regulation should be effective. Can it be true that, notwithstanding this action, the Fence Regulation must be considered as void, because its language is adopted from a former Regulation which was not effective? Certainly not. It is of no consequence where the language of a regulation may or may not have formerly appeared, or how ineffective it may formerly have been.

The motion for new trial is overruled.

THOS. H. ANDERSON, *Justice.*

Supreme Court of the District of Columbia.

FRIDAY, *April 23rd,* 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

Before Judge Anderson.

No. 50108. At Law.

JULIA FITZGERALD, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

Upon consideration of the motion for a new trial filed
11 herein, and heretofore submitted to the court, it is ordered that said motion be, and the same is hereby overruled, and judgment on verdict is ordered. Wherefore, it is considered and adjudged, that the plaintiff herein recover of defendant herein the sum of One Hundred and Sixty-four Dollars ($164.00) with interest thereon from this date, together with costs of suit to be taxed by the clerk, and have execution thereof.

From the aforegoing the defendant by its attorneys, in open court, note an appeal to the Court of Appeals, whereupon the court fixes the penalty of a bond to operate as a Supersedeas, in the sum of Three Hundred ($300.00) Dollars.

Bond for Appeal to Court of Appeals.

Filed May 5, 1909.

In the Supreme Court of the District of Columbia.

No. 50108. At Law.

JULIA FITZGERALD
vs.
B. & O. R. R. Co.

Know all men by these presents, That we, The Baltimore and Ohio Railroad Company, a corporation, as principal, and National Surety Company of New York, a corporation, as surety, are held and firmly bound unto the above named Julia Fitzgerald in the full sum of Three hundred 00/100 Dollars to be paid to the said Julia Fitzgerald her executors, administrators, successors, or as-
12 signs. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, administrators, successors, and assigns, firmly by these presents. Sealed with our seals, and dated this 1st day of May, in the year of our Lord one thousand nine hundred and nine.

Whereas the above-named The Baltimore and Ohio Railroad Company has prosecuted an appeal to the Court of Appeals of the District of Columbia, to reverse the Judgment rendered in the above suit by the said Supreme Court of the District of Columbia:

Now, therefore, the condition of this obligation is such, That if the above-named The Baltimore and Ohio Railroad Company shall prosecute its said appeal to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

BALTIMORE AND OHIO RAILROAD COMPANY,
By GEORGE E. HAMILTON,
Attorney-in-fact. [SEAL.]
NATIONAL SURETY COMPANY,
By W. H. RONSAVILLE,
Attorney-in-Fact. [SEAL.]

Sealed and delivered in presence of—

——— ———.

Approved the 5 day of May, 1909.
THOS. H. ANDERSON,
Justice, S. C. D. C.

13 *Memorandum.*

August 3, 1909.—Time in which to file Transcript of Record in Court of Appeals extended until October 8th, 1909.

Supreme Court of the District of Columbia.

MONDAY, *August* 30, 1909.

Session resumed pursuant to adjournment, Hon. Thomas H. Anderson, Justice, presiding.

No. 50108. At Law.

JULIA FITZGERALD, Pltf.,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Def't.

Now comes here the defendant by its Attorneys and prays the Court to sign, seal and make part of the record, its bill of exceptions taken during the trial of this cause (heretofore submitted) now for then, which is accordingly done.

14 *Bill of Exceptions.*

Filed Aug. 30, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 50108.

JULIA FITZGERALD, Plaintiff,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

Be it remembered That the above-entitled cause came on for hearing in said court on the 24th day of March, 1909, before Hon. Thomas H. Anderson, an Associate Justice of said court and a jury regularly empanelled to try the cause.

The plaintiff to maintain the issues on her part joined, called as a witness Dr. William Tindall, who testified as follows:

That he was Secretary to the Board of Commissioners of the District of Columbia, and as such custodian of the various records of the Board including the Police Regulations that the so-called "fence regulation" being Section 16 of Article 10 of the Police Regulations of the District of Columbia, found in the pamphlet published August 31, 1894, was promulgated and duly published by the Commissioners on June 15, 1887, under the authority conferred upon the Commissioners by the Act of Congress of Jan. 26, 1887, said section 16 of Article 10 of said Regulations read-as follows:

"Whenever the grade of a steam railroad track is approximately even with the adjacent surface, the line of the road shall be
15 securely closed on both sides with a substantial fence, and all grade crossings or intersections of any steam railroad tracks with streets or avenues, shall be securely guarded by a suitable gate

or guard, erected and maintained by the company owning or operating such track."

The witness further testified that on the 31st day of August, 1894, the Commissioners passed an order enacting all of the regulations then in force, the preamble of said order reading as follows:

"Office of the Commissioners of the District of Columbia.

WASHINGTON, D. C., *Aug.* 31, 1894.

Ordered by the Commissioners of the District of Columbia that, under and by virtue of the authority and power conferred upon the said Commissioners by, among others, an act of the Congress of the United States approved January 26, 1887, and a joint resolution approved February 26, 1892, the following regulations be, and they hereby are, made and declared as Police Regulations in and for the said District, namely:"

Then followed in volume 7 of the Commissioners' minutes and order book, all of the regulations deemed to be in force at that time, including the regulation above set forth. That no publication of these Police Regulations was made, such as is required by
16 law when a new regulation is enacted, and that the only publication that had ever been made of section 16 of Article 10 prior to June 4, 1895, occurred immediately after its promulgation in 1887. That on June 4, 1895, the Commissioners amended section 16 of Article 10 by inserting therein the word "roads" between the words "with" and "streets" the following being the language of the order:

"Ordered * * *

12. That section 16 of Article 10 of the Police Regulations in and for the District of Columbia, made August 31, 1894, is hereby amended by the insertion of the word "roads" after the word "with" in the fourth line thereof, so that the first sentence of said section shall read as follows: 'Whenever the grade of a steam railroad track is approximately even with the adjacent surface, the line of the road shall be securely closed on both sides with a substantial fence, and all grade crossings or intersections of any steam railroad track with roads, streets or avenues, shall be securely guarded by a suitable gate or guard erected and maintained by the company owning or operating such track.' "

The witness further testified that the entire section as amended was duly published as required by law; that witness could find no official repeal of said regulation either in its original or amended form.

Whereupon the plaintiff offered said original regulation and
17 amended regulation in evidence, to which offer the defendant objected, on the ground that the Commissioners under the act of January 26, 1887, had no authority to pass the original regulation of June 15, 1887, and to the amended regulation on the ground that said regulation on its face purported to amend the regulations of August 31, 1894, there being no valid Police Regulations enacted as of that date; and on the further ground that said regulation and the amendment thereof was unreasonable, and had been

repealed by implication and non-user, and that said regulation was unconstitutional, null and void because its enforcement would prevent the free use by the public of a public street of the City of Washington. The Court sustained said objection as to the original regulation, but over the objection of the defendant admitted said amended regulation in evidence as a valid Police Regulation, to which admission of said amended regulation the defendant then and there duly noted an exception, which exception was then and there entered upon the minutes of the court.

On cross examination the witness testified as follows:

That said regulation had not appeared in any compilation of the Police Regulations since 1894, although said compilations were supposed to contain all the regulations then in force; that there was no authority in law for the compilation of the Police Regulations in book form, but that these compilations had been issued about every three years by the Commissioners, for their own convenience, and the convenience and information of the public.

18 The witness also testified as to the promulgation and proper publication of Section 1, Article 9, of the Police Regulations, known as the "whistle" regulation, and section 27, of Article 10, known as the "speed" regulation, which said regulations were offered and admitted in evidence, said regulations reading as follows:

Article IX.

SEC. 1. No bell, horn, gong, whistle, drum, or other noise-making article instrument, or device shall be struck or sounded on or in any street, avenue, alley, highway, footway, sidewalk, parking, or other public space in the District of Columbia for any purpose whatsoever, except as provided in section 4, of Article 10, of these Regulations: Provided, that street cars may continue the use of a sta*t*ring gong or bell, and shall strike a gong at every street crossing, and where otherwise required to give warning, and bicycles, tricycles, and motor vehicles shall sound a suitable bell, gong, or horn when necessary to warn persons of their approach; but nothing herein shall permit any unnecessarily loud or any discordant alarm device to be used, but the same are hereby expressly forbidden.

Provided: That scissor grinders may for the purpose of attracting attention to their business, ring a bell of such size and

19 in such manner as will not disturb the comfort or quiet of any neighborhood.

That Section 4 of Article 10 of the Police Regulations referred to in the foregoing section, reads as follows:

SEC. 4. Sleighs and other vehicles on runners shall have bells so attached thereto, or to the animals drawing the same, as to sound when such vehicle is in motion motor carriages and all cycles, bicycles, tricycles, and carts for the collection of ashes and combustible waste, shall have at all times a suitable gong or bell (or, in the case of motor vehicles, a suitable horn), sufficiently distinctive from the bells provided for the fire department and ambulance service, so attached as to be readily sounded for the purpose of warning persons of their approach; and all cycles, bicycles, tricycles and motor

vehicles in motion, between one hour after sunset, and one hour before sunrise, shall display suitable lights."

Article X.

SEC. 27. Steam railway trains or engines shall not move within the city limits at a greater rate of speed than Twelve (12) miles an hour. Motormen of street cars, before crossing the tracks of a steam railroad shall bring their cars to a full stop. The conductor of any such car shall thereupon alight, and go forward in advance thereof, to the railroad track and look along the same in all directions, and upon satisfying himself from observation that the said railroad track may be crossed with safety, shall so notify the motorman of
20 such car, who shall not attempt to cross said railroad track until directed by the conductor after such observation, so to do."

Whereupon the plaintiff, to further maintain the issues on her part joined, called as a witness JOHN FITZGERALD, who testified as follows:

That he was the son of the plaintiff, and together with his brother N. A. Fitzgerald, conducted the ice business of the plaintiff; that they got their supply of ice from the Chapin-Sacks Mfg. Company, whose place of business is on the west side of First Street, Northeast, north of M Street; that on the morning of August 31, 1907, at 6:30 A. M. he was standing near the corner of First and M Streets, N. E., on First Street, and two wagons of plaintiff were standing on M Street near First, waiting their turn to drive up to the platform of the Chapin-Sacks Company, which is on the west side of First Street, to obtain their supply of ice; that he signalled to driver of first wagon to come around on First Street; that there was no train in sight at the time the wagon started, but just as it passed north of M Street a train came backing around the curve, and the air whistle blew at Patterson Street, which is half way between M and N; that there is a curve at Florida Avenue, about two blocks and a half north of the place of accident, and that the train whistled at N Street, about a block north of the place of accident. The mare became frightened, and the witness went to her and got hold of bridle and tried to quiet her, but she backed the wagon into the second car of train and was knocked down. The train stopped between K and L Streets. The team when struck was on First Street about midway between M and Patterson; that the railroad
21 track at this point is unfenced and is about 3 or 4 or 5 inches below the grade of the street. The first the witness knew of the train coming was by hearing the air whistle blow, and at that time the engine of the train which was attached to the rear of it, was just in sight; that the driver was doing all he could to get the horse out of danger; that the railroad tracks are in the middle of First Street, with a roadway on either side; that on the west side, where the accident occurred, two teams can pass one another at the same time; that the train was going pretty rapid; that the witness had been going to Chapin and Sacks' for six years, and had seen

many trains. That this train was going faster than he had seen other trains move. That the team when it stopped to wait for a place to back into the Chapin-Sacks platform was parallel to and about ten feet from the railroad track. That the horse was not scary unless something unusual happened; that the horse first became frightened when the whistle was sounded at N Street, and that after being knocked down the first time, the horse got up and was knocked down the second time; that the witness had been unable to locate the driver of the team, who was a colored man named Lawler, so as to have him present at the trial.

On cross-examination witness testified as follows:

That the air whistle which was sounded from the rear of the first car backing in, blew just as that car was getting to Patterson Street, about 200 feet north of where the team was standing; that the trains backing in always blow the air whistle; that when the witness looked around the train was right on the wagon and the horse began to prance; that the witness grabbed her by the
22 bridle; that when wagon stopped on First Street it was six to ten feet from the track. Witness denied that he had ever stated to defendant's claim agent that he had been unable to catch the horse by her head or bridle. Whereupon he was shown a statement made by him to the claim agent of the defendant, and identified both of his signatures thereon. Witness further testified that it was the second car of the train which struck the wagon; that standing at M Street you can see a train to Florida Avenue, about 400 feet away; that the air whistle was sharp and shrill and awful loud.

Thereupon plaintiff's attorney offered in evidence the statement of witness given to defendant's claim agent, which statement is as follows:

The Baltimore and Ohio Railroad Company.

Statement of Witness.

1. Did you see the accident to Fitzgerald's horse, wagon and driver?

Answer. Yes.

2. State date, hour and place of accident.

Answer. About 6:30 a. m. Aug. 31, '07, near M st. crossing, Wash., D. C.

3. State particularly where you were at the time of the accident, what you were doing, if anything, and how you came to see the accident.

Answer. I was standing about 15 ft. North of M Street crossing on First St., Wash., D. C., and I was signaling to my driver to come in to load.

4. State what you did immediately after the accident, and what, if anything, the injured person said about it.

Answer. I put injured man in wagon to send him to hospital and looked after my team. Driver was unconscious.

5. Did you see any other person or persons who saw the accident? If so, give their names and addresses.

Answer. E. F. Lawler, # 1928 K St. N. W.

6. Give a full account of the accident as you saw it.

Answer. About 6:30 A. M. Aug. 31, '07 I was standing on first St. about 15 ft. North of M St. crossing, Wash., D. C., N. E., directing my driver. Just before # 4 backed in over M St. crossing I signalled my driver who was on M St. to come in on First St. and back in to load. My driver, (Lawler) drove up First St.
23 towards N St. i. e. North and distant about 20 ft. from East bound B. & O. track. When driver had reached a point about 40 or 50 ft. above M St. train # 4 came around curve and air whistle was blowing. Horse started to back and I tried to catch her by head but could not get hold of her. I called to driver to jump out but he could not jump as horse had doubled back against wagon by cramping fifth wheel unless he jumped straight ahead. Train # 4 struck wagon and knocked horse down. Damaged wagon about $15.00. Do not know yet extent of injury to horse. My horse did not stop at all from time I signaled driver up from M St. to First St. until she (the horse) started to back into train. I and my brother, N. A. Fitzgerald run the Fitzgerald ice business for our mother, Mrs. Julia Fitzgerald, of # 30 Mass. Ave., Washington, D. C. I value horse injured at $175.00.

JOHN J. FITZGERALD.

I have read the foregoing, and the statements made are true.

JOHN FITZGERALD.

City or town: Wash. No. 30 Mass. Ave. State: D. C.

Witness:

J. D. JACK.

9/5/07."

Whereupon the plaintiff, to further maintain the issues on her part joined, offered herself as a witness, and testified as follows:

That she was the owner of the horse and wagon damaged in the accident, and that the wagon cost $90 four years ago. She bought another wagon for $88.00, while the damaged wagon was being repaired; that the repairs of the damaged wagon cost $16.50 which she paid. The injured horse was nine or ten years old, and was laid up for thirty six days, and for three months thereafter was of no use. She paid $145.00 for the mare three years previous to the accident. She afterwards sold the mare for $90.00.

On cross-examination she testified as follows:

That the accident happened August 31, 1907, but that she did not receive the wagon as repaired until October, 1907. That she
24 bought a new wagon the day after the accident for $88.00, and has both wagons now.

Whereupon the plaintiff, to further maintain the issues on her part joined, called as a witness WILLIAM MATTHEWS who testified as follows:

That he was working for Mrs. Fitzgerald at the time of the accident as a driver, and was in the double team wagon waiting at First and M Streets Northeast at the time the accident happened; that he saw the accident; that the other wagon which was driven by a driver named Lawler, was signaled to by John Fitzgerald to come up, and it came up and stopped, and that then the train came in and hit it; that the air whistle on the train was right loud but not so very loud. That it blew three whoops, when it was 5 or 6 feet north of Patterson Street; that the horse backed into the train, the second coach from the end hitting the wagon and knocking the horse down twice; that he heard the whistle blow again when the train was almost opposite the horse.

On cross-examination the witness testified as follows:

That Lawler, the driver of the injured team, had his team standing about 5 feet from the track in front of Chapin-Sacks' platform for about five minutes before the train came.

Whereupon the plaintiff to further maintain the issues on her part joined, offered as a witness N. A. FITZGERALD, who testified as follows:

That he was a son of the plaintiff, and with his brother John Fitzgerald, managed the ice business for his mother; that he had made measurements of First Street, N. E. at the place of the accident. First Street was 110 feet wide 26 feet in the center
25 thereof being occupied by the railroad company; that from the outside of the east track to the outside of the west track was 18 feet; that the roadway of First Street was 42 feet wide on either side of the track that the roadway was 3 inches higher than the tracks; that Dr. Robinson's bill for tending the horse was $43, which was paid, and that the horse was laid up for 3 months after leaving the hospital, and unable to do any work, and that the plaintiff hired a horse for part of the time that the mare was laid up, at $1.50 a day; that the railroad tracks between M and N Streets, N. E., the place of the accident, were unfenced, and that the injured mare, in the opinion of the witness, was worth $200, and horses are worth $1.50 a day.

Whereupon the defendant to maintain the issues on its part joined, called as a witness, THOMAS J. HENRIX, who testified as follows:

That at about 6:30 A. M. on August 31, 1907, the B. & O. train of which he was conductor, was backing into the station in Washington City; that witness was standing on the rear platform of the train, that being the front of the train backing in as it approached M Street crossing Northeast; that he did not see the accident at all; that the so-called air whistle is nothing but the hose of the air brake from the end of which the air is allowed to escape; that the whistle is not large in volume but is louder than a tin whistle and is only sounded when necessary. The train was going about four or five

miles an hour, and the witness saw no frightened team; that the whistle was not blown except when the train was rounding the Florida Avenue curve, about 400 feet north of the place of
26 this accident; that the whistle was not blowing as the train approached M Street; that the witness did not see the accident because the team backed into the train after the car he was on had passed.

On cross-examination witness said his recollection was that train was due at 6:30 A. M.

Whereupon the defendant to further maintain the issues on its part joined, called as a witness F. H. KLINE, who testified as follows:

That he was the brakeman on the Baltimore and Ohio train that was backing into the station at Washington about 6:30 A. M. on the morning of August 31, 1907; that he was standing on the rear platform with conductor Henrix; that he did not notice the team as the train approached M Street crossing, nor was the whistle blowing. That the last time the whistle blew was at the Florida Avenue curve; that at M Street the train was going six or eight miles an hour.

Whereupon the defendant to further maintain the issues on its part joined, called as a witness A. M. COLSON, who testified as follows:

That on the morning of August 31, 1907, he was the fireman on the train in question, which was backing over the M Street crossing on its way to the B. & O. Station, Washington City, the engine being at the rear of the train as it backed in. That he first caught sight of the driver of the Fitzgerald wagon when he (the driver) was 15 or 20 feet north of the M Street crossing; that he was sitting on the seat of his covered ice wagon, pulling on the lines and whipping the horse; that all the cars of the train, with the exception of the car nearest the engine, had passed the wagon when the
27 horse turned and cramped the wagon by the fifth wheel, which threw the hood and front wheel in contact with the car nearest the engine. The shock of the contact threw the driver out into the street. The wagon was overturned. The train was going about eight miles an hour at the time of the accident. The trains backing in always sound the air whistle on the Florida Avenue curve, but not thereafter, unless there is something on the track.

Whereupon the defendant to further maintain the issues on its part joined, called as a witness G. E. YASTE, who testified as follows:

That at the time of the accident in question he was the day flagman for the defendant at the M Street crossing, and was on duty there at 6:30 A. M. on the morning of August 31, 1907; that he was standing at the gates at M Street, operating them, when the train in question backed over the M Street crossing. Fitzgerald's driver had his horse standing parallel with the east bound main track, the horse's head being to the north, and about five feet from the outside rail. The train was backing in and Fitzgerald's horse shied away

from the train and then backed the wagon into the train. The wagon was overturned. Witness did not remember whether the air whistle was blowing or not.

Whereupon the defendant to further maintain the issues on its part joined, called as a witness J. R. MEADE, who testified as follows:

That he was foreman of the Chapin-Sacks Company, at the corner of First and M Streets, Northeast, Washington, and that on the morning of the accident he was on duty on the platform in front of the building; that Fitzgerald's wagon drove up First Street
28 and stopped before Witness had room for him to back into the platform. After the train passed the horse got uneasy and cramped the wheel, backing the wagon into the train. The engine of the train stopped between M and L Streets after the accident, Fitzgerald's driver had been standing for five minutes in roadway of 1st Street three feet from and parallel to the track before the train appeared.

On cross-examination the witness said that the train was going around the bend when the air whistle sounded. It was not going any faster than they usually go, and was not blowing the whistle in front of the Chapin-Sacks Company's property.

Whereupon the defendant, to further maintain the issues on its part joined, called as a witness J. H. ROY, who testified as follows:

That he was a driver for J. D. Brady, an ice dealer, and at the time of the accident was standing on the northwest corner of First and M Streets about twenty feet from the track; that the air whistle sounded between Florida Avenue and N Street. Fitzgerald's wagon was six or seven feet from the track and was struck by the second coach from the engine. That he could have easily gotten on or off the train, and that it was not going fast; that Fitzgerald's wagon took up its position near the railroad track before the train came in sight; that after the first two cars of the train had passed the horse became frightened and started to walk away from the train, but the driver grabbed for the reins, and caused the horse to back the wagon into the train, the driver being knocked out of the wagon on to the street. At the time of the accident witness was standing about ten feet from Fitzgerald's wagon. Witness took the
29 driver, who was unconscious in his wagon and drove him to the hospital.

On cross-examination witness stated that according to his best recollection the whistle stopped blowing at N Street.

Whereupon the defendant to further maintain the issues on its part joined, called as a witness FREDERICK THOMPSON, who testified as follows:

That he was yard man for the Consolidated Coal Company, whose office was at the northeast corner of First and M Streets, Washington; that at the time of the accident he was standing about 30 feet from the point where the wagon and horse were struck. That prior to the accident Fitzgerald's wagon and horse were standing about 20 feet

north of the M Street crossing and parallel to and 6 or 7 feet from the track; that as the train passed, the horse shied and the driver grabbed the lines. The horse backed into the side of the cars and the wagon and horse were knocked over.

Thereupon the plaintiff recalled in rebuttal N. A. FITZGERALD, who testified as follows:

That there was a gully on the west side of the track at least three inches deep, and that there was another gully between east and west bound tracks about 3 or 4 feet deep, so that teams could not drive across the tracks in front of the Chapin-Sacks place, and that the right of way of the railroad covered by tracks was not used and could not be used by teams crossing from side to side.

This was all the evidence offered on behalf of the plaintiff.

Whereupon the defendant prayed the Court to instruct the
30 jury upon all the evidence to return a verdict for the defendant, but the court refused to so instruct the jury to which ruling and action of the court the defendant by its counsel then and there excepted, and said exception was noted upon the minutes of the court.

Whereupon the defendant further prayed the court to instruct the jury as follows:

2. The jury are instructed that there is no evidence in this case that the defendant's train was moving at an unlawful rate of speed at the time of the accident, and that the railroad company has authority to make all reasonable noises incident to the working of its trains, including a proper danger signal, and is not liable while exercising such right in a reasonable and prudent manner, for injuries occasioned by horses becoming frightened at such noises.

which prayer was granted.

The defendant further prayed the court to instruct the jury as follows:

3. The jury are instructed that although the blowing of a small whistle by the conductor while standing on the rear of the defendant's train, while said train was on a public street, if they should find that a whistle was blown on the street, may be considered by them as some evidence of negligence, yet if the jury find that plaintiff's horse became frightened, not from the blowing of said whistle, but because of the approach of the defendant's train and the noises incident to the usual and ordinary movement thereof, and because of

the fact that said horse had been stopped by plaintiff's driver
31 and allowed to stand in close proximity to said track, then the plaintiff is not entitled to recover, and their verdict should be for the defendant."

But the Court refused to so instruct the Jury; to which ruling and action of the Court the defendant, by its counsel, then and there excepted, and said exception was duly noted upon the minutes of the court.

The defendant further prayed the court to instruct the jury as follows:

3½. If the jury believe that the plaintiff's horse became frightened at the ordinary movement of defendant's train, or because said horse was allowed to stand in close proximity to the track, and if they further find that said horse, after becoming frightened, turned away from said track, but because of the action of the driver in pulling on the reins, and of plaintiff's son in trying to stop said horse, the wagon was backed into the side of the train, causing the injury complained of, then their verdict should be for the defendant, notwithstanding the fact that they might find the air whistle was being blown as said train approached the M Street crossing.

But the Court refused to so instruct the jury, to which ruling and action of the Court the defendant, by its counsel, then and there excepted, and said exception was duly noted upon the minutes of the court.

The defendant further prayed the court to instruct the jury as follows:

4. If the jury should find for the plaintiff, then they are instructed that they cannot allow plaintiff the cost of the new wagon purchased by her, but they should allow her such sum as was necessary
32 to repair the damaged wagon but the Court refused to so onstruct the jury; to which ruling of the court the defendant, by its counsel, then and there duly excepted, and said exception was duly noted upon the minutes of the court.

And thereupon the court of its own motion, instructed the jury as follows:

"The plaintiff prosecutes this suit against the defendant railroad company to recover damages which she says resulted from the negligence of the defendant in failing to have its railway tracks at the time and at the point of the accident securely closed on both sides with a substantial fence, whereby the plaintiff's horse and wagon were struck and injured by one of its passing trains. The alleged duty of the defendant to them and there have its said tracks securely closed on both sides with a substantial fence is based upon the provisions of the Police Regulations relating to fences as follows:

"Whenever the grade of a steam railroad track is approximately even with the adjacent surface the line of the road shall be securely closed on both sides with a substantial fence."

Before the plaintiff can recover he must satisfy you by the weight or preponderance of the evidence that the grade of the defendant's railroad tracks at the time and at the place where this accident occurred, was approximately even with the adjacent surface of the street, and that they were not so closed, and further, that such omission on the part of the defendant directly caused the injury of which the plaintiff complains, so that, unless you are satisfied from the weight or preponderance of the evidence that the grade
33 of the defendant's tracks at the time and place of the accident was approximately even with the adjacent surface of the street, then it would follow that the defendant was not bound to fence in or enclose its tracks in the manner indicated by the Police Regulations to which I have called your attention, or in any

other manner, and therefore, in that view of the case, it would be your duty to return a verdict for the defendant.

But, if on the other hand you are satisfied from the weight or preponderance of the evidence, that at the time and place of the accident the defendant's tracks were approximately even with the adjacent surface of the street, and that its tracks were not enclosed, and that such failure on the part of the defendant company to comply with the provisions of said Police Regulations directly caused the injury, then as matter of law the defendant was guilty of negligence, and your verdict should be in that view of the case for the plaintiff, unless you should find that notwithstanding such negligence upon the part of the defendant the plaintiff was himself then and there guilty of negligence, that directly contributed to the accident and the consequent injury to his property. Or, in other words, to put the same proposition in different form, if you are satisfied from the weight or preponderance of the evidence that at the time and place of the accident the grade of the defendant's tracks was approximately even with the adjacent surface of the street, then it was the duty of the defendant to securely close the line of its road on both sides with a substantial fence and if such failure directly caused the injury complained of, then in that view of the
34 case the defendant would be guilty of negligence as matter of law, and your verdict in such event should be for the plaintiff, unless the plaintiff was guilty of negligence that directly contributed to the accident and the consequent injury to his property.

(Read defendant's No. 2.)

Negligence Not Presumed.

You will bear in mind, gentlemen, in considering the evidence, that the mere happening of an accident does not constitute negligence or any presumption of negligence for the reason that the existence of negligence is a question of fact to be determined by the jury, upon the evidence submitted to you in the course of the trial, so that you cannot assume that because this accident occurred to the plaintiff's property was injured, that it was the result of the defendant, nor can you assume that the plaintiff himself was guilty of contributory negligence, and therefore it is, that you must turn to and be guided solely by the evidence in determining whether the defendant was guilty of negligence which directly caused the injury complained of, or whether the plaintiff himself directly contributed thereto.

Contributory Negligence.

In considering the question of contributory negligence, you are not confined to the evidence offered on behalf of the defendant, and if the existence of any contributory negligence which occasioned the accident, appears in the plaintiff's evidence or from the testimony of plaintiff's witnesses, then the plaintiff is not entitled to recover.

It was the duty of the plaintiff, in approaching the plat-
35 form to which he was proceeding with his horse and wagon, and in placing or stopping the same thereat, to do so in the exercise of reasonable care, that is, such care and caution as a person of ordinary prudence and caution would exercise under the same or similar circumstances.

In other words it was the duty of the plaintiff, upon the occasion in question, to use ordinary and reasonable care to prevent injury to his horse and wagon, and he can only recover damages for such loss as could not by the exercise of such care, have been avoided. It is for you to determine from all the facts and circumstances, whether the plaintiff failed to exercise that care and prudence which an ordinarily prudent man would have exercised under the same or similar circumstances, so that if you should find from the evidence that the plaintiff was not in the exercise of that degree of care and caution as I have just indicated, at the time he was injured, and that such omission contributed to the injury of which he complained; then that omission would constitute such contributory negligence on the part of the plaintiff as would disentitle him to recover, and in that situation of the case your verdict must be for the defendant, whether you find the defendant to have been also guilty of negligence or not. By this I mean that before the plaintiff is entitled to recover he must satisfy you by the weight or preponderance of the evidence that the injury complained of was the result of the wrong doing or the fault of the defendant, and if it transpires that he in any way contributed to the injury of which he complains, as a proximate or producing cause thereof, then no matter if the defendant shared or participated in the wrongdoing or negli-
36 gence the responsibility for such mutual wrongdoing or negligence cannot be apportioned between the parties, and hence in that view of the case it would be your duty to return a verdict for the defendant.

Contributory negligence upon the part of the plaintiff is not however, as I have already stated, to be presumed to exist, but the burden of proving contributory negligence upon the part of the plaintiff is upon the defendant, unless the same appears in the plaintiff's evidence or from the testimony of the plaintiff's witnesses, as is likewise the burden upon the plaintiff to establish negligence in the first instance upon the part of defendant.

If you find for the plaintiff then the damages should be for such sum as will reasonably compensate the plaintiff for the injuries sustained, not exceeding $296, and in estimating the damages the jury are to consider the loss occasioned to the plaintiff by reason of the injury to the plaintiff's mare and wagon, the reasonable cost for any necessary hospital treatment and care of the mare, for her injuries during the time she was disabled, also the reasonable cost for repairing the wagon, including the loss, if any, sustained by the plaintiff in being deprived of the use of her mare during the time she was so far disabled by reason of her said injuries as not to be in a condition to be used and worked by the plaintiff."

Whereupon, and before said jury retired, the defendant, by its

counsel, excepted to that portion of the charge of the Court which instructed the jury that if they were satisfied from a preponderance of the evidence that at the time and place of the accident the
37 defendant's tracks were approximately even with the adjacent surface of the street, and that said tracks were not enclosed with a substantial fence, and that such failure on the part of the defendant company to comply with the provisions of the Police Regulations directly caused the injury, then, as a matter of law, the defendant was guilty of negligence, and their verdict should be for the plaintiff, unless they should further find that notwithstanding such negligence on the part of the defendant, the plaintiff himself was guilty of contributory negligence for the reason that there was no such valid Police Regulation in force at the time of said accident, and further, that if such regulation had not been formerly repealed, it was unreasonable and unconstitutional, null and void, which exception was then and there noted upon the minutes of the Court.

Thereupon the defendant further excepted to that portion of the charge of the Court which instructed the jury that if they found for the plaintiff, then they might include in such verdict damages for the loss, if any, sustained by the plaintiff in being deprived of the use of her mare during the time she was so far disabled by reason of her said injuries as not to be in a condition to be used and worked by the plaintiff, on the ground that there was no evidence in the case that the plaintiff had sustained any loss by reason of not being able to use her horse, because of the injuries which it had received, which exception was then and there duly noted upon the minutes of the Court.

All of the foregoing proceedings were had and exceptions noted before the jury retired to consider of their verdict.

38 And thereupon the defendant, by its attorneys, prayed the court to sign and seal this its bill of exceptions, to have the same force and effect as to each and every exception above stated as though the same were set forth in a separate bill of exceptions: which request was granted, and accordingly the court signs and seals this bill of exceptions to have the force and effect aforesaid, now for then, this 30th day of August, 1909.

THOMAS H. ANDERSON, *Justice.*

39 *Directions to Clerk for Preparation of Transcript of Record.*

Filed August 30, 1909.

In the Supreme Court of the District of Columbia.

Law. No. 50108.

JULIA FITZGERALD
vs.
B. & O. R. R. Co.

The Clerk will please include in the record on appeal to the Court of Appeals the following:

(1) Transcript of record from J. P.
(2) Memo. of verdict.
(3) Opinion of Court.
(4) Judgment.
(5) Appeal.
(6) " Bond.
(7) Bill of Exceptions.
(8) This Designation.

G. E. HAMILTON,
Att'y for Def't.

Above designation satisfactory to plaintiff.

P. R. HILLIARD,
Att'y for Plaintiff.

Aug. 30/09.

Memorandum.

October 6, 1909.—Time in which to file Transcript of Record in Court of Appeals further extended to, and including, October 25th, 1909.

40 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 39, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 50108 at Law, wherein Julia Fitzgerald is Plaintiff and the Baltimore and Ohio Railroad Company, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 21st day of October, A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2081. The Baltimore and Ohio Railroad Company, a corporation, appellant, vs. Julia Fitzgerald. Court of Appeals, District of Columbia. Filed Oct. 23, 1909. Henry W. Hodges, clerk.

Henry W. Hodges
Clerk

IN THE

Court of Appeals, District of Columbia.

JANUARY TERM, 1910.

No. 2081.

THE BALTIMORE & OHIO RAILROAD COMPANY, A CORPORATION, APPELLANT,

vs.

JULIA FITZGERALD, APPELLEE.

BRIEF ON BEHALF OF THE APPELLANT.

GEORGE E. HAMILTON,
Attorney for Appellant.

MICHAEL J. COLBERT,
JOHN W. YERKES,
JOHN J. HAMILTON,
Of Counsel.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

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Court of Appeals, District of Columbia.

JANUARY TERM, 1910.

No. 2081.

THE BALTIMORE & OHIO RAILROAD COMPANY, A CORPORATION, APPELLANT,

vs.

JULIA FITZGERALD, APPELLEE.

BRIEF ON BEHALF OF THE APPELLANT.

I.

Statement of Case.

This suit was brought before a justice of the peace by the appellee to recover damages caused to her horse and wagon on August 31, 1907, and claimed to have been caused by the negligence of the appellant. Judgment having been entered before the justice of the peace in favor of the defendant company, an appeal was taken to the Supreme Court of the District of Columbia, where, after trial, a verdict and

judgment was entered in favor of the appellee in the sum of $164, from which judgment an appeal is taken to this court.

It appears that at the time of the accident the appellee was engaged in the ice business, and that one of her sons had taken two of her wagons to the ice plant of the Chapin-Sacks Company, located on the west side of First street, northeast, a short distance north of M street, for the purpose of obtaining ice.

It further appears that the tracks of the appellant on what was known as the Metropolitan Branch were located in the center of First street, and that these tracks proceeded along First street from the old B. & O. station, until they reached a point a short distance north of N street, where they curved to the east through square 710, and crossed Florida avenue at the point of its intersection with New York avenue.

It further appears that the platform of the Chapin-Sacks Company, from which ice was loaded into wagons, faces First street, and that it was the custom for wagons to take their turn in coming up to the platform to be loaded, and while waiting for that purpose, they would stand in line on M street, west of the crossing.

On the morning in question, the plaintiff's son signaled to one of his drivers, who was then standing on M street, to drive up towards the platform of the ice plant for the purpose of obtaining a load, before there was room for his wagon at the platform, and the driver, in obedience to the signal, drove his team up First street parallel with the track and stopped in front of the platform, with his horse facing north, and within from three to seven feet of the track, according to the testimony of different witnesses.

After this team had been standing in the place above mentioned for the space of five minutes or more, waiting for an opportunity to drive in to the platform, and while it was still standing in said position, one of the regular trains of the appellant appeared around the curve from Florida avenue, above N street, backing in to the station, the rear car

of the train thus being the first car coming in, and the engine being located at the other end of the train.

It appears that this train was moving at a slow rate of speed, and that the conductor and brakeman were standing on the rear platform handling the air hose, and keeping a lookout to see that the street crossings were clear.

It further appears from the defendant's testimony, as the train was backing around the curve through square 710, the conductor sounded the air hose in the usual and ordinary manner, because he could not see the M Street crossing. One of the plaintiff's witnesses, however, testified that the whistling noise caused by the escape of air from the air hose, was made just before the car reached Patterson street, which is a short distance south of N street, and another that it sounded at N street; but all of the witnesses agreed that the train was coming around the curve when the whistle sounded, which curve in fact was shortly north of N street.

It further appears from the evidence that as the rear end of the train was passing the spot where the plaintiff's horse was standing, the horse became restive, and started to prance, and to walk away from the train, and the driver, who was seated on the wagon, grabbed up his reins, and attempted to hold the horse and prevent it from moving away from the track.

Plaintiff's witness Fitzgerald also testified that he either grabbed the horse by the bridle, or attempted to grab the bridle for the purpose of controlling the horse. In the effort on the part of the driver and of the witness Fitzgerald to hold the horse, the wagon was backed into the side of the train as it was passing, and was overturned and the horse thrown down and both wagon and horse were injured.

The witness J. H. Roy, who was a driver for another ice team, and was standing on the northwest corner of First and M streets at the time of the accident, testified (Rec., p. 17) that the horse did not become frightened, and start to walk away from the train, until after the first two cars of

the train had actually passed by; and the witness Colson, who was the fireman on the train, and was leaning out of his window, looking south, testified (Rec., p. 16) that after the horse started to walk away from the train the driver grabbed the reins and began pulling on the horse and caused it to turn short, cramping the wagon on the fifth wheel, which threw the hood and off front wheel in contact with the car next to the engine, all of the other cars having gotten past.

Witness Meade, the foreman of the Chapin-Sacks Company, testified (Rec., p. 17) that Fitzgerald's wagon drove up First street and stopped before the witness had room for him to back in to the platform, and that after the train passed the horse got uneasy and cramped the wheel, backing the wagon into the train.

Witness Thompson testified (Rec., p. 17) that he was employed by the Consolidated Coal Company, and was standing on the northeast corner of First and M streets, about thirty feet from where the horse and wagon were struck; that prior to the accident Fitzgerald's wagon was standing about twenty feet north of the M Street crossing, parallel to and six or seven feet from the track, and that as the train passed the horse shied, and the driver grabbed the reins and the horse backed into the side of the cars and was knocked over.

The defendant's witnesses, Henrix and Kline, the conductor and brakeman respectively of the train, who were standing on the front platform of the first car as the train backed in, testified that they did not see the accident, and did not know anything about it until after the train had stopped, and that as they approached the M Street crossing, they did not see any team which appeared to be frightened.

From this testimony it appears that the horse became frightened from the noise of the train as it was actually passing it, because of its close proximity to the track, and started to move away from the track, but was restrained either by the driver or the witness Fitzgerald, or both, and

in their efforts to stop the animal, the wagon was backed into the car next to the engine and injured.

There is absolutely no evidence in the record which contradicts or tends to modify the statements hereinbefore set forth.

It further appeared in evidence that the tracks of the railroad company on First street, at the point where the accident took place, were not fenced, and that there was a driveway on First street, on each side of the tracks.

At the trial below, the plaintiffs offered in evidence a police regulation promulgated by the Commissioners on June 15, 1887, and known as section 16, article X, of said Police Regulations, and thereafter amended, relating to the fencing of tracks of steam railroads where they are approximately even with the adjacent surface of the streets, said regulation as amended being admitted in evidence over the objection of the defendant.

II.

Assignments of Error.

1. The court below erred in admitting in evidence the police regulation known as section 16, article X, passed June 15, 1887, as amended on June 4, 1895.

2. The court below erred in refusing to grant the appellant's first prayer, which instructed the jury on all of the evidence to return a verdict for the defendant, said prayer being found on page 18 of the record.

3. The court below erred in refusing to grant the appellant's third prayer, found on page 18 of the record.

4. The court below erred in refusing to grant the appellant's prayer No. 3½, found on page 19 of the record.

5. The court below erred in refusing to grant the appellant's fourth prayer, found on page 19 of the record.

6. The court below erred in its oral charge to the jury, wherein the jury were charged that if they were satisfied from the evidence that at the time and place of the accident defendant's tracks were approximately even with the adjacent surface of the street, and that its tracks were not enclosed, and that such failure on the part of the defendant company to comply with the provisions of the Police Regulations directly caused the injury, then, as a matter of law, the defendant was guilty of negligence, unless they should further find that the plaintiff was guilty of contributory negligence; or in other words, that if they were satisfied from the evidence that the grade of the defendant's tracks was approximately even with the adjacent surface of the street, then it was the duty of the defendant to securely close the line of its road on both sides with a substantial fence, and if such failure directly caused the injury complained of, then the defendant would be guilty of negligence as a matter of law, and the verdict should be for the plaintiff.

7. The court below erred in its oral charge to the jury in instructing the jury that if they should find for the plaintiff, they might include in such verdict damages for the loss, if any, sustained in being deprived of the use of her mare during the time she was so far disabled as not to be in condition to be used and worked by the plaintiff.

III.

ARGUMENT.

Appellant's first, second, and sixth assignments of error may be considered together, as they involve the validity of section 16, article X, of the Police Regulations of 1887, and the subsequent attempted amendment thereof on June 4, 1895, and whether or not that amended regulation was in force at the time of this accident, and was applicable to the facts in this case.

If the amendment of said regulation of 1895 was valid and still in force at the time appellee's cause of action arose, and its violation by the appellant was the proximate cause of the accident, then it is admitted that such violation would be some evidence of negligence on the part of the appellant, entitling the appellee to go to the jury, but if it is unconstitutional, null, and void, or had been repealed by implication or otherwise before the happening of the injury to appellee's team, or its violation was not the proximate cause of the accident, then it is insisted that there is no evidence in the record showing any negligence on the part of the appellant, and the jury should have been instructed to return a verdict for the railroad company.

The appellant was given the right to run its tracks along First street northeast, in pursuance of an act of Congress passed July 25, 1866 (14 Stat., 250), the exact route over which the tracks were to extend having been agreed upon and authorized by the corporation of Washington, through its board of aldermen and board of common council, in pursuance of the power vested in them by said act of Congress, and the occupation of said street by the tracks of said appellant was, therefore, lawful.

Glick *vs.* B. & O. R. R. Co., 19 D. C., 412.

The police regulation above referred to, and commonly known as the "Fence Regulation," was promulgated by the Commissioners of the District of Columbia on June 15, 1887, under the supposed authority of the act of Congress of January 26, 1887 (24 Stat., 368), which conferred upon the Commissioners power to make and "enforce usual and reasonable police regulations" covering ten different specified subjects, but a casual reading of this law is sufficient to show that none of these specified subjects had any reference whatever to the subject of said police regulation, except possibly the tenth provision of said act, giving authority to regulate the movement of *vehicles* on the public

streets and avenues for the preservation of order and protection of life and limb. The statute referred to reads as follows:

> "*Be it enacted, &c.*, That the Commissioners of the District of Columbia be and they are hereby authorized and empowered to make, modify and enforce usual and reasonable police regulations in and for said District, as follows:
>
> "First. For causing full inspection to be made, at any reasonable times, of the places where the business of pawnbroking, junk-dealing, or second-hand clothing business may be carried on.
>
> "Second. To regulate the storage of highly inflammable substances in the thickly-populated portions of the District.
>
> "Third. To locate the places where licensed venders on streets and public places shall stand, and change them as often as the public interests require, and to make all the necessary regulations governing their conduct upon the streets in relation to such business.
>
> "Fourth. To make needful regulations for the orderly disposition of carriages and other vehicles assembled on streets or public places, and to require vehicles upon such streets and avenues as they deem necessary to pass along on the right side thereof.
>
> "Fifth. To establish and regulate the charges to be made by owners of hacks and hackney carriages of any kind whatsoever.
>
> "Sixth. To prohibit conducting droves of animals upon such streets and avenues as they may deem needful to public safety and good order.
>
> "Seventh. To regulate the keeping and running at large of dogs and fowls.
>
> "Eighth. To prohibit the deposit upon the streets or sidewalks of fruit, or any part thereof, or other substance or articles that might litter the same, or cause injury to or impede pedestrians.
>
> "Ninth. To regulate or prohibit loud noises with horns, gongs or other instruments, or loud cries, upon the streets or public places, and to prohibit the use of any fireworks or explosives within such portions of the District as they may think necessary to public safety.

"Tenth. To regulate the movements of vehicles on the public streets and avenues for the preservation of order and protection of life and limb.

"Eleventh. To prescribe reasonable penalties for the violation of any of the regulations in this act mentioned; and said penalties may be enforced in any court of the District of Columbia having jurisdiction of minor offenses, and in the same manner that such minor offenses are now by law prosecuted and punished.

"SECTION 2. That the regulations herein provided for shall, when adopted, be printed in one or more of the daily newspapers published in the District of Columbia, and no penalty prescribed for the violation of said regulations shall be enforced until thirty days after such publication."

Under the supposed authority of this law, the Commissioners, on June 15, 1887, promulgated the fence regulation, known as section 16, article X, of the police regulations, which reads as follows:

"Whenever the grade of a steam railroad track is approximately even with the adjacent surface, the line of the road shall be securely closed on both sides with a substantial fence, and all grade crossings or intersections of any steam railroad track with streets or avenues, shall be securely guarded by a suitable gate or guard, erected and maintained by the company owning or operating such track."

That the act of Congress above quoted did not confer general power upon the Commissioners to enact usual and reasonable regulations upon any and all subjects which they might consider called for regulation, but, on the contrary, was limited to the enactment of regulations upon the subjects specified in said act, has been frequently held by this court.

Fulton *vs.* D. C., 2 App. D. C., 431.
R. R. Co. *vs.* D. C., 10 App. D. C., 125.
Callan *vs.* D. C., 16 App. D. C., 274.
Taylor *vs.* D. C., 24 App. D. C., 395.
Coughlin *vs.* D. C., 25 App. D. C., 252.

In the Coughlin case this court was asked to pass upon a regulation requiring lot owners to remove snow and ice from the sidewalks abutting on their lots, and the court said:

> "The regulation cited is stated to have been copied from an old municipal ordinance of the city of Washington; and authority for its resurrection and reenactment by the Commissioners of the District is claimed to be found in the act of Congress of January 26, 1887, 24 Stat. at L., 368, chap. 48, and in the joint resolution of Congress of February 26, 1892, 27 Stat. at L., 394, but no such authority can reasonably be claimed under the act of 1887, which is specifically restricted to eleven distinct subjects of regulation, of which the removal of snow and ice from the streets of the District is not one."

Counsel for appellee claims that the tenth subject of regulation specified in the act of Congress is the authority for the enactment of the fence regulation. That paragraph of the act very clearly refers only to the regulation of the movement of *vehicles* on the public streets and avenues, and does not include, nor was it intended to include, the power to compel steam railroads having merely a right of way for its tracks over the streets and avenues, which streets and avenues the public also had the right to use, to fence their tracks so as to completely obstruct the free use of the streets and avenues by the public, except at street crossings. Indeed this court has held, in the case of R. R. Co. *vs.* District of Columbia, 10 App. D. C., 111, that the tenth clause of the act of 1887 did not even confer authority upon the Commissioners to regulate the movement of trains and locomotives on the right of way of a railroad company. In that case the Chief Justice said:

> "We agree with the appellants that railroad locomotives and cars are not within the meaning of the word 'vehicles' as used in the foregoing clause. They may, no doubt, be regarded as vehicles in a strained sense, and therefore held to be comprehended in the word when such an intention can be reasonably gath-

> ered from the context; but they are not within its usual and ordinary signification."

It is perfectly manifest, therefore, that the Commissioners were not authorized by the act of 1887 to pass the fence regulation. Nor could the joint resolution of Congress of February 26, 1892, enlarging their powers, have the effect of validating a void regulation passed in 1887.

The second section of the joint resolution of 1892 is as follows:

> "SECTION 2. That the Commissioners of the District of Columbia are hereby authorized and empowered to make and enforce all such reasonable and usual police regulations, in addition to those already made under act of January twenty-sixth, eighteen hundred and eighty-seven, as they may deem necessary for the protection of lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the District of Columbia."

It is argued by appellee, however, that the old fence regulation of 1887 was amended by the Commissioners after the passage of the joint resolution, to wit, on June 4, 1895, by inserting the word "roads" at one place therein, and that the amendment was published as required by law, and was equivalent to the enactment of a new regulation under the increased powers conferred upon the Commissioners by the joint resolution; but the facts appearing in the record (page 10) show that the Commissioners did not attempt to amend the fence regulation of 1887, but they did attempt to amend *"section 16, article X of the Police Regulations in and for the District of Columbia, made August 31, 1894."* No regulations were made and promulgated in the manner required by law on August 31, 1894; but it appears (Rec., pp. 10, 11) that beginning August 31, 1894, the Commissioners published, and continued to publish every three years thereafter, in pamphlet form, for their own convenience and the convenience of the public, but without authority of law, all

of the police regulations, original or amended, and supposed to be in force at the time of the publication. These publications in pamphlet or book form were never intended to be considered the same as the adoption of new regulations in the first instance, and no notice of the collation and issuance of these compilations was ever given. They were merely the collection of all of the regulations which had been passed or amended from time to time into one pamphlet or book, for convenient reference and use; and hence there never was any notice by publication for thirty days, as required by law to be had when a new regulation is made or an old regulation is amended.

It is now claimed by appellee that the attempted amendment and publication of the void regulation in the manner above indicated made the regulation as amended valid.

(*a*) *The Amended Regulation was Void Because There was no Penalty for Its Violation.*

It is to be noticed in the first place that the record does not disclose that there was ever enacted any penalty for violation of the fence regulation of 1887; and the amendment published on June 4, 1895, did not pretend to enact or re-enact any penalty to cover violations of the regulation, either as amended or as originally formed.

In other words, assuming for the sake of argument (but which we do not admit to be the fact) that the Commissioners possessed full authority after the passage of the joint resolution, to pass a fence regulation, and assuming that the publication of the amended regulation of June 4, 1895, was equivalent to the passing and publication of a new fence regulation, yet it is not pretended or claimed that at the time of the publication of the amended regulation the Commissioners enacted a penalty for its violation, or attempted to re-enact the penalty, if any, which was provided for the regulation of 1887. This being so, the amended regulation was unenforceable, null and void, created no duty or obli-

gation or liability on the part of the railroad company to fence its tracks, and its violation was not *prima facie* evidence, or even any evidence, of negligence on the part of the railroad company.

In Smith's Modern Law of Corporations, vol. I, paragraph 546, it is said:

> "Since an ordinance without a penalty would be nugatory, a corporation that has the power to pass the ordinance has an implied power to provide for its enforcement by proper and reasonable fines against those who break it. * * * In order that an ordinance, penal in its nature, may be valid, there must be an appropriate and legal penalty. Where the section of an ordinance providing a penalty is void, the entire ordinance is a nullity."
>
> "An ordinance without a penalty for its violation is nugatory. It is an appropriate and legal sanction which gives vitality and force to the ordinance and renders the prohibited act unlawful, and without this sanction no proceedings under it for its enforcement could have any vitality, and the ordinance itself is a nullity. * * * It is concluded that the whole ordinance must fail as devoid of any binding force whatever because of the entire illegality of the penalties attempted to be imposed by the third section thereof."
>
> Tomlin *vs.* Cape May, 63 N. J. Law, 429.
> Smith *vs.* Gouldy, 58 N. J. Law, 562.
> Massinger *vs.* Millville, 63 N. J. Law, 123.
> Cleveland *vs.* State, 3 R. I., 117.

(b) The amended regulation was void, because it was an attempted amendment of a void regulation.

We do not believe that it will be seriously argued by counsel for appellee that the original fence regulation of June 15, 1887, was valid because the Commissioners were given authority to pass it under the act of Congress of January 26, 1887.

We think that it has already been settled by this court

that the Commissioners had no such power under the act of Congress referred to, and that the regulation was absolutely void, whether or not a penalty was enacted for its violation.

This regulation, therefore, being void, was it possible for the Commissioners to revive it and give it life after their increase of powers received under the joint resolution of Congress, by the attempted amendment of June 4, 1895.

We understand the law to be that a void law or ordinance cannot be revived or amended, and that the attempted amendment of such void law or ordinance is itself void and of no effect.

> "The power of a municipal corporation to enact ordinances includes by implication the power to amend or repeal them. The general rules governing the amendment or repeal of statutes are applied to the legislation of municipal corporations. An amendment of a void ordinance is ineffectual to create a valid and enforceable ordinance."
>
> Smith's Modern Law of Corporations, vol. 1, par. 543.

In Cowby *vs.* Town, 60 Ind., 327, suit was brought in a civil action to recover a penalty for violation of a town ordinance prohibiting the sale of liquor without a license, the town claiming authority to pass the ordinance under an amendment of March 1, 1877, to an act of the legislature of March 2, 1855, the court after referring to decisions, said:

> "Under the light of this and other decisions of this court we think that the above entitled act, approved March 2, 1855, was unconstitutional and void. It follows of necessity that the act of March 1, 1877, to amend the first section of the act of March 2, 1855, is also invalid and void, for a valid law cannot be enacted by amending an invalid and void law."
>
> Blakemore *vs.* Dolan, 50 Ind., 194.
>
> Ford *vs.* Barker, 53 Ind., 395.

> "An act of the legislature not authorized by the State constitution at the time of its passage, is void,

> and is not validated by a subsequent adoption of an amendment to the constitution authorizing it."
>
> State *vs.* Tufley, 20 Nev., 427.

> "The act of 1868, to continue in force certain laws, does not apply to section 2877 of the Code as to judgment liens; this never having been duly enacted."
>
> Dane *vs.* McArthur, 57 Ala., 448.

The constitution of 1865 restricted municipal subscriptions to railroad stock. Held, that a statute repugnant to the constitutional provision and repealed, acquired no force by being subsequently incorporated in a revision of the statutes.

Cock *vs.* Stewart, 85 Mo., 675.

A question similar to the one at issue here, arose in the State of Washington, in the case of Harland *vs.* Territory, 3 Washington, 131 (13 Pac., 453), where the court said:

> "The book published as the code of Washington is a private compilation of the laws of Washington Territory without any legislative authorization, and an act of the legislature purporting to amend one of the sections thereof is void."

(*c*) *The amended regulation was void because it attempted to amend a regulation of August 31, 1894, whereas it appears from the record that there was no regulation passed August 31, 1894.*

This objection to the amended regulation of June 4, 1895, has already been referred to, and it hardly seems necessary for us to say much more on the subject.

It appears from the testimony of Dr. Tindall (Rec., p. 10) that on August 31, 1894, the Commissioners collected together "*all of the regulations then in force,*" or supposed to be in force, including the fence regulation of 1887, and had printed a pamphlet containing all of said regulations;

that there was no notice by publication or otherwise of the printing of this pamphlet, and that said pamphlet was gotten out solely for the convenience of the Commissioners and the convenience and information of the public.

On June 4, 1895, desiring to amend the fence regulation, by inserting the word "roads," the Commissioners did not refer to the regulation as of the date of its passage, to wit, June 15, 1887, but referred to it by section and article number of the police regulations *made August 31, 1894* (Rec., p. 10). This may have been due to carelessness or inadvertence on the part of the Commissioners, but it nevertheless appears that they attempted to amend a regulation made August 31, 1894, when as a matter of fact there was no such regulation bearing that date.

We think that this mistake or oversight is in itself sufficient to justify the court in declaring the amendment as ineffectual and void.

(d) The amended regulation was void because it was unusual and unreasonable, and a deprivation of the rights of property owners abutting on the streets on which the company was required to fence its tracks, and in excess of the authority possessed by the Commissioners.

It is a well-known fact that the title to the bed of the streets in the city of Washington is in the United States, and not in the city or in the owners of the adjacent lots, and is subject only to the easements which citizens, and property owners abutting thereon, have therein for free passage, and all the ordinary and usual uses of streets.

The appellant was given the legal right to place its tracks on First street, but this right amounted to nothing more than a special easement or privilege for the purposes mentioned. It did not give to the company title to that portion of the street occupied by its right of way, or exclusive control thereover. It was given the privilege of using said street,

and its right of way thereon, in a reasonable manner in moving its cars and engines to and from its depot; and any inconvenience which might result to private individuals from the careful exercise of this privilege was *damnum absque injuria*. But as said by the court in general term, in the Glick case, *supra*, "We have repeatedly held that the concession of a privilege to use the streets of a city was necessarily limited to such use as should not destroy the enjoyment of them as streets, and that what might be an authorized use of side tracks and land acquired by purchase or by condemnation, was an unauthorized abuse of the streets." Nor did the act of Congress give to the company even the exclusive right to the use of that portion of the street occupied by the tracks, to the exclusion of the rights of citizens.

It was, therefore, not in the power of the Commissioners, to make a police regulation broader in its terms than the act of Congress, which authorized the company to run along First street, and which would have the effect of separating that portion of the public street occupied by the right of way from the rest of the street, and assigning it to the exclusive use of the railroad company to the exclusion of property owners abutting on the street, and other citizens who might desire to use the street. We do not believe that the Commissioners, having the power only to make usual and reasonable regulations, have the right to say to a property owner whose house may be in the middle of the block facing on First street that he shall not cross the street in front of his property, but must go to the corner or to the nearest railroad crossing in order to get over to the other side of the street; and we think that if an attempt was made to enforce the regulation requiring the railroad company to fence its right of way, the citizen would have the absolute right to enjoin the construction of such fence, as a deprivation upon his property rights.

"It is well settled that a building, or other structure, or the placing of materials, such as lumber or coal, for an unreasonable time or in an unreasonable manner, upon a street or highway, without the sanction of the legislature, is a public nuisance, and the municipal corporation in whose streets such nuisance may exist cannot give a valid permission thus to occupy its streets without express power to this end, conferred by charter or statute. The usual power to regulate and control streets has never been held to authorize the municipal authorities to allow them to be encroached upon by the adjoining owners, by erections thereon of buildings, or the use thereof as places of deposit for lumber, or coal, or other materials, for their own exclusive use. And such continuous obstruction of a public street or highway, not authorized by competent legal authority, is a public nuisance, for which the authors of it may be held liable. * * * The piling of the lumber and keeping it within the limits of the street was, therefore, a nuisance and a wrong as against the public, and all suffering private injuries in consequence of its existence."

Smith *vs.* Davis, 22 App. D. C., 298.

The case of Curry *vs.* District of Columbia, 14 App. D. C., 423, on appeal to this court from the police court, involved the validity of a police regulation attempting to set apart a portion of a public street as a hack stand for the exclusive use of one of the railroad companies. It is to be noted that the police regulation in this case was based on a joint resolution of Congress, approved June 7, 1898. Congress was asked to grant the railroad company the exclusive license to use a portion of the street for its cab stand, but refused to do so. The court said:

> "Plainly, the effect of the regulation made by the Commissioners is to give an undue preference to the railroad company, and absolutely to prohibit all other persons from engaging in a lawful and unobjectionable business at the place designated. Now, while it may be competent for the Commis-

sioners, for good cause, wholly to prohibit such business at the place designated, it is not competent for them to disregard the principle of equality of right and to allow the business to be carried on by one person and to prohibit all others from engaging in it. It is candidly conceded that, if they may lawfully do this, they may equally discriminate all over the city, and may exclude all others persons than this one railroad company from engaging in the business. We cannot admit the existence of any such authority of the Commissioners, or any power in Congress to grant it to them. This is precisely the kind of power which, in the cases above cited, the Supreme Court of the United States has decided not to exist in our country. * * *

"The streets of the city of Washington are for the equal use of all the public; and it is violation of the fundamental principle of equality to attempt to give an exclusive privilege in them, or in any part of them, to any one person, company or organization whatsoever, to the exclusion of others equally entitled."

See also—

District of Columbia *vs.* Hazel, 16 App. D. C., 283.
District of Columbia *vs.* Sargeant, 17 App. D. C., 264.
Railroad Company *vs.* Hunter, 6 App. D. C., 309.
Railroad Company *vs.* Fitzgerald, 2 App. D. C., 501.

"Where the municipal authorities have no power to make a municipal regulation it is void, although it is reasonable, just and proper in itself, and even necessary for the preservation of peace and good order."

Taylor *vs.* District of Columbia, 24 App. D. C., 392.

"The District of Columbia has no legislative power, it being merely a municipal corporation bearing the same relation to Congress that a city does to the legislature of the State in which it is incorporated.

"A municipal corporation has only such powers as are expressly granted to it; those incident to its

express powers and implied therein, and those indispensable to the declared objects and purposes of the corporation; and any doubt as to the existence of a power is resolved against the municipality."

U. S. *ex rel.* Daly *vs.* Macfarland, 28 App. D. C., 552.

In the case of R. R. Co. *vs.* Warner, 35 Ind., 515, the court said:

"Counsel for the appellee insist that in towns and cities railroad companies are bound to fence their roads with the same care as without their limits; that the exception only extends to places where it is unreasonable or improper that the road should be fenced, whether within or without the corporate limits of towns and cities. This position may be correct as to those railroads which own, exclusively, the right of way in a town or city, in which they run, or through which they pass. In such a case it would, it seems to us, be possible for the company to fence in their road by making the required fences along the sides thereof and the necessary cattle-guards to prevent cattle from going from the streets or alleys across which the road passes, upon the track of the railroad. But this case is not one of this character. There are cases where the railroad company has not the exclusive right of way, as where the road runs along, instead of running across the street or alley, and where others, as well as such company, have the right to pass on and along such street or alley. In such cases it seems to us that the company is not required to, and cannot legally construct fences or make cattle-guards on or along its track."

In Riffe *vs.* Ry. Co., 42 Minn., 34, the court said:

"It would seem to be a case where a public street is jointly occupied by the public and the company, though the public travel, as would naturally be the case, goes to the side most convenient and where there is most room. We are not warranted in holding that the defendant has acquired an exclusive right to a definite portion of the street so that it would

> have a right to divide the street by a fence so as to cut off all approach to the other side of the street except at cross streets. * * *
>
> "It is manifest that in any event a fence as proposed in the street would amount to an obstruction which it does not appear that the defendant would have a right to make, and the evidence presumptively, we think, brings the case within the implied exceptions to the statutory rule requiring fences."
>
> Vale *vs.* Ohio Co., 7 Ind., 479.
>
> State *vs.* Morris Co., 25 N. J. Law, 437.

(*e*) *The amended regulation was not only void, but was repealed by implication.*

There is another remarkable fact about this fence regulation which we wish to call to the attention of the court at this point. Dr. Tindall, the secretary to the Commissioners, testified (Rec., pp. 10, 11) that all of the police regulations which are in force, or supposed to be in force, are officially compiled and published by the Commissioners every three years; so that there have been five or six of these publications since August 31, 1894, each one prepared under order of the Commissioners, and bearing at its head a statement that under authority conferred upon the said Commissioners by Congress "the following regulations be and they hereby are made and declared as police regulations in and for the said District." This court referred to one of these codifications in the Curry case, *supra*, by saying:

> "Under date of July 1, 1898, the Commissioners of the District adopted and promulgated a code of police regulations, constituting a revision and amendment of previously existing regulations." * * *

It further appears that the amended fence regulation of 1895 has never appeared in any of these publications, did not appear in the compilation of the regulations in force at the time of the injury to appellee's team, and does not appear in the police regulations today; nor has the original

fence regulation of 1887 appeared in any of said official publications of the police regulations since that of August 31, 1894. It is true that Dr. Tindall testified that he could find no official repeal of either the original or amended fence regulation; but it has nevertheless been dropped from the official publications of all of the regulations supposed to be in force, for the past fifteen years, and has never been enforced by the municipal authorities during that period of time.

Under these circumstances it seems fair and reasonable to assume, that the only explanation as to why said regulation has been omitted all these years, is that said regulation was in fact repealed by the Commissioners, or was held null and void by the court, and therefore omitted from the official compilation of the regulations published in the manner hereinbefore indicated.

It was contended by appellee in the court below, and no doubt will be urged here, that this court, in the case of Baltimore and Potomac Railroad Company *vs.* Cumberland, 12 App. D. C., 598, upheld the fence regulation, now under discussion, as a valid exercise of the power reposed in the Commissioners by Congress, but it is to be noted that in that case no question was raised as to the power of the Commissioners to make the regulation, or as to its reasonableness; and the court was not called upon to pass on either feature of the question.

The railroad company had maintained its fences on Virginia avenue in the vicinity of the place of the accident for many years, and it did not want its authority to do so questioned; it therefore admitted the validity, and reasonableness of the fence regulation, and the other ordinances offered in evidence, but questioned its application to the facts in the case, on the ground that its tracks at the point of the accident were not approximately even with the surface of the street. On this point the court said, at page 602:

> "At the trial of the case in the court below, the testimony on both sides seems to have been adduced

> without much controversy as to its admissibility; and no question is presented to us in that regard. But there were introduced in evidence certain regulations made by the Commissioners of the District of Columbia, under authority of law, the reasonableness of which is not questioned, but of which the application is greatly brought in question."

A reading of the case shows that the main question in the case was whether or not the plaintiff should be charged with being guilty of contributory negligence. The court was justified in assuming, and did assume, that the fence regulation was valid; and after disposing of the defendant's lukewarm objection to the application of the ordinance to the facts in the case, said:

> "But it is due to the appellant to say that no great reliance is placed upon this point, either in the brief or in the argument. Greater reliance is placed upon the question raised by the other assignments of error, in connection with which the contributory negligence, with which it is sought to charge the plaintiff, may be considered."

In addition to the above, it is necessary to add that the Commissioners had express legislative authority to pass an ordinance requiring the Baltimore and Potomac Railroad Company to fence its tracks on Virginia and Maryland avenues. Section 4, of the act of the Third Legislative Assembly of the District of Columbia, chapter 53, and thereafter known as section 128, of chapter 16, of Abert's Compiled Statutes of the District of Columbia, and in force at the time of the adoption of the regulation of 1887, is as follows:

> "SEC. 128. That the Baltimore and Potomac Railroad Company and the Alexandria and Washington Railroad Company shall have, or cause to be erected, a substantial iron or paling fence, not less than five feet high, along each side of their track or tracks within the city of Washington, from their depot or depots at the corner of Sixth and B streets northwest,

> along Sixth street to Virginia avenue, along Virginia avenue to Third street southwest, and also from the intersection of Sixth street and Maryland avenue, along Maryland avenue to Ninth street southwest, with sliding gates at each street-crossing, to be closed while trains or locomotives are passing: *Provided*, That no part of said inclosed space shall be used for the purpose of parking cars or the depositing of goods or material of any kind."

We do not believe, in the light of the authorities hereinbefore quoted, that the legislative enactment above quoted was valid and constitutional. We merely cite it to call the court's attention to the fact that the Commissioners had supposed legal authority for making the regulation of 1887, so far as it would apply to the Baltimore and Potomac Railroad tracks on Maryland and Virginia avenues and Sixth street, but that authority did not authorize the passing of an ordinance which in terms would apply to the tracks of any other railroad company, or on any other streets.

IV.

Appellant's third and fourth assignments of error refer to the refusal of the trial court to grant certain prayers on behalf of the appellant, and as they both raise the question of the contributory negligence of the appellee's employees and of proximate cause, they will be considered together.

The third prayer told the jury that although the blowing of the hose whistle on the street would be evidence of negligence on the part of the defendant, yet if they found that the horse became frightened, not at the blowing of the whistle, but at the approach of the train and the noises usually incident to the movement of the train, and because it was left standing in close proximity to the track, then the plaintiff was not entitled to recover. The court had already told the jury in the second prayer granted on behalf of the appellant, that the company had the legal right to make all reasonable noises incident to the working of its trains, including

a proper danger signal, and was not liable while exercising such right in a reasonable and prudent manner for injuries occasioned by the horse becoming frightened at such noises, and also that there was no evidence that the defendant's train was moving at an unlawful rate of speed; and the third prayer simply told the jury that if these acts caused the horse to become frightened, or if it was frightened because of the act of the driver in stopping the horse too close to the track. then plaintiff could not recover. We think the refusal to grant this prayer was undoubted error.

> "A railroad company has authority to make all noises incident to the working of its trains, including the proper danger signals, and is not liable while exercising such right in a reasonable and prudent manner for injuries occasioned by horses frightened at such noises."
>
> R. R. Co. *vs.* Coker, 90 S. W. Rep. (Ark.), 999.
>
> R. R. Co. *vs.* Hamilton, 66 S. W. Rep., (Texas), 797.

A railroad company having a track adjoining a highway is not responsible to travelers whose horses become frightened by the noise of its engines or trains if the same were operated prudently, and without unnecessary noise or wilful disregard of a traveler's perilous position after it has been discovered by the servants of the company. A railroad company is not required to keep a lookout specially for travelers on a highway running parallel with and in close proximity to the railroad track, nor to keep its trains so under control that they can be stopped if a team is found on a point of danger on such highway, nor to exercise the same degree of care as is required at grade crossings. A railroad company has the right to operate its road in a lawful manner, and when it does so without negligence and without malice, is not responsible for injuries occasioned thereby."

Fares *vs.* R. R. Co., 77 Pac. Rep., 230.

Hendricks *vs.* R. R. Co., 93 N. W. Rep. (Neb.), 141.

R. R. Co. *vs.* Schmidt, 134 Ind., 16.

Duvall *vs.* R. R. Co., 73 Md., 516.

> Injuries resulting from the frightening of a horse by the appearance of moving railway cars, trains or locomotives, or the usual noise or incidents of their ordinary operation, are *damnum absque injuria.*
>
> Dewey *vs.* R. R. Co., 11 A. & E. R. R. Cases, N. S., 275.

The fourth prayer told the jury that if they found that the horse became frightened at the ordinary movements of the train, or because it was left standing too close to the track, and that in trying to move away from the track to a place of safety the conduct of the plaintiff's employees caused the horse to back the wagon into the side of the train, then such action on the part of the employees was the proximate cause of the accident, and plaintiff could not recover.

Even if the court should be of the opinion that the fence regulation was valid, and that failure to obey it was evidence of negligence on the part of the appellant, we submit that this fourth prayer, above referred to, instructing the jury on the question of proximate cause, should have been granted.

It seems to us that the propositions of law advanced by the third and fourth assignments of error are so well established as to need no further citation of authority to sustain them.

V.

Appellant's fifth and seventh assignments of error relate to the measure of damages.

The fifth assignment relates to the refusal of the court to grant appellant's fourth prayer, relating to one of the elements of damage, and in which the jury were told that they could not allow the plaintiff the cost of a new wagon which had been purchased by her the day after the accident, but that they should allow her such sum as was necessary to repair the damaged wagon and restore it to the condition in which it was before the accident.

The evidence shows that the accident happened on August 31, 1907, and the next day the plaintiff bought another wagon for $88.00, but did not have the old wagon repaired until the month of October following; that the cost of repairs to the old wagon was $16.50.

The courts have frequently laid down the rule that where personal property is damaged by a railroad company, the owner is entitled only to such damages as will make him whole. In other words, that he cannot insist upon being supplied with new articles of personal property in place of those only partially damaged and which can be rapaired; and that when property has been so injured as to be capable of being restored to its former condition, then the measure of damages is the cost of making the necessary repairs.

The seventh assignment of error relates to that portion of the charge of the trial court in which the jury were told that if they found for the plaintiff, they might include in their verdict damages for loss, if any, sustained by the plaintiff in being deprived of the use of her horse during the time it was disabled by reason of its injuries. This portion of the charge was objected to by appellant for the reason that it did not seem to us that there was sufficient evidence to justify the jury in awarding any sum for loss of the services of the horse. The plaintiff testified (Rec., p. 14) that the injured horse was laid up for thirty-six days after the accident, and for three months thereafter was of no use. She does not testify ever having hired a horse to take the place of the injured animal, or ever having paid anything on account of the hire of another horse. Her son, N. A. Fitzgerald, however (Rec., p. 15), after testifying to the horse being incapacitated for work, says that "the plaintiff hired a horse for part of the time that the mare was laid up, at $1.50 a day." How many days she hired a horse, or how much was paid for hire, nowhere appears in the record; and to allow the question of the amount that would be due the plaintiff on that item of damage to go to the jury would

be to permit them to guess at a sum which might be entirely at variance with the actual fact.

Under these circumstances it seems to us that the jury should have been instructed that there was not sufficient evidence to justify them in allowing the plaintiff anything on account of hire of another horse.

It is respectfully submitted that, for the errors complained of and hereinbefore set forth, the judgment on behalf of the plaintiff should be reversed and a new trial ordered.

Respectfully submitted,

GEORGE E. HAMILTON,
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MICHAEL J. COLBERT,
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In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1909.

No. 2081.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
A CORPORATION, APPELLANT,

vs.

JULIA FITZGERALD, APPELLEE.

BRIEF FOR APPELLEE.

P. R. HILLIARD,
Attorney for Appellee.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

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I.

Statement of the Case.

This is an appeal from a judgment of the Supreme Court of the District of Columbia. The facts in the case are as follows:

On August 31, 1907, the appellee, Julia Fitzgerald, who was then engaged in the retail ice business, sent her son and two other employees to the ice plant of the Chapin-Sacks Manufacturing Company, located on the west side of First street, between M and N streets N. E., Washington, D. C., for the purpose of procuring ice.

The appellee's son, John Fitzgerald, on arriving at the ice plant went on First street, in front of the ice company's platform, to ascertain if there was a vacant space wherein he could have his wagons loaded, the wagons at the time being on M street, near the corner of First street. Seeing a vacant space he signaled the driver of the first wagon to come on first street, which the driver did. When the driver had reached a point about forty or fifty feet north of the corner of First and M streets, a train of the appellant company backed in toward the station; the whistle of the train, which was operated by one of the train crew, and which was located on the rear platform of the last car (being the first car as train moved), was sounded as the train approached, and the appellee's mare became frightened and backed the wagon into the moving train, causing injuries to the mare and damage to the wagon.

At the place of the accident the appellant company then operated what is known as the Metropolitan branch of the Baltimore and Ohio Railroad; the tracks of the railroad were laid in the center of First street, northeast, and occupied a space of twenty-six feet as a right of way, the width of First street at the place in question being one hundred and ten feet, of which forty-two feet on each side of the appellant's right of way was used as a public street; the tracks of the appellant company were unfenced at the place of the accident, and the grade of the part of First street used by the public for teams, etc., was three inches higher than the grade of the part of First street used by the railroad company; that there was a gully three or four feet deep between the eastbound and westbound tracks, and that teams could not drive across the tracks in front of the Chapin-Sacks Manufacturing Company, and that the right of way of the railroad covered by tracks was not used, and could not be used by teams crossing from side to side.

I.

ARGUMENT.

The first exception taken by the appellant appears on page 11 of the record, and is based upon the fact that the court admitted in evidence as a valid police regulation the following, being section 16 of article 10 of the police regulations of the District of Columbia:

> "Whenever the grade of a steam railroad track is approximately even with the adjacent surface, the line of the road shall be securely closed on both sides with a subtantial fence, and all grade crossings, or intersections of any steam railroad track with roads, streets or avenues shall be securely guarded by a suitable gate or guard, erected and maintained by the company owning or operating such track."

The Commissioners of the District of Columbia, it is submitted had authority under the act of February 26, 1892 (27 Stat. at L., 394), to enact this regulation. Section 2 of said act is as follows:

> "That the Commissioners of the District of Columbia are hereby authorized and empowered to make and enforce all such reasonable and usual police regulations in addition to those already made under act of January twenty-sixth, eighteen hundred and eighty-seven, as they may deem necessary for the protection of lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the District of Columbia."

The language of this act is so general and comprehensive in its scope, and the object aimed at by the police regulation in question, namely, the protection of life and limb, is so obviously within its provisions that nothing further than the citation of the act seems necessary to show that the Commissioners had authority to enact said police regulation.

Railroad Co. *vs.* D. C., 10 Appeals D. C., 111.

The regulation is a reasonable exercise of municipal control, inasmuch as it aims at the very objects referred to under the act of February 26, 1892, namely, the protection of the lives, limbs, health, etc., of the community.

Jeffersonville, etc., R. Co. *vs.* Parkhurst, 34 Indiana, 501.

Toledo, etc., R. Co. *vs.* Howell, 38 Indiana, 447.

Indianapolis, etc., R. Co. *vs.* Lindley, 75 Indiana, 426.

Taylor *vs.* District of Columbia, 24 Appeals D. C., 392.

This regulation has never been repealed by the Commissioners (Rec., p. 10), and the contention of appellant that it has been repealed by implication and nonuser is without foundation. The fact that it has not appeared in the publication entitled "Police Regulations of the District of Columbia" since 1894 argues nothing in favor of its repeal, for the reason that this publication or book is gotten up for the accommodation of the Commissioners and the public, and there is no warrant of law requiring its publication. Further this police regulation was before this court in the case of Railroad Co. *vs.* Cumberland, 12 Appeals D. C., 598, in the year 1898, four years after its last appearance in the manual of police regulations, and in the case of Bark "Shetland" *vs.* Johnson, 21 Appeals D. C., 416, the court said in substance that a custom in favor of failure to observe the law is not a custom, but a conspiracy.

American & English Enc. of Law, vol. 26, pages 715–720, 721–737.

This regulation was originally promulgated and published June 15, 1887 (Rec., p. 9), under the supposed authority conferred upon the Commissioners by an act of Congress approved January 26, 1887 (24 Stat. at L., 368).

Thereafter, on August 31, 1894, the Commissioners, evidently doubting their authority to enact this fence regulation under the specific grants of authority contained in the act of January 26, 1887, re-enacted same as follows (Rec., p. 10):

> "Ordered by the Commissioners of the District of Columbia that under and by virtue of the authority and power conferred upon the said Commissioners by, among others, an act of the Congress of the United States, approved January 26, 1887, and a joint resolution approved February 26, 1892, the following regulations be, and they hereby are, made and declared as police regulations in and for the said District, namely;"

then followed all of the regulations deemed to be in force, including the so-called fence regulation.

Section 2 of the act of January 26, 1887, provides:

> "That the regulations herein provided for shall, when adopted, be printed in one or more of the daily newspapers published in the District of Columbia, and no penalty prescribed for the violation of said regulations shall be enforced until thirty days after such publication."

The regulation in question was published on June 4, 1895, after the word "roads" was added thereto (Rec., p. 10), the Commissioners enacting on this latter date:

> "That section 16 of article 10, of the police regulations in and for the District of Columbia, made August 31, 1894, is hereby amended by the insertion of the word 'roads' after the word 'with,' in the fourth line thereof, so that the first sentence of said section shall read as follows:"

Then follows the police regulation, supra.

This amendment of June 4, 1895, refers to the enactment of section 16, article 10, *made* August 31, 1894, and the language of the statute is that regulations, when *adopted*, shall be published, etc.

The law does not require the publication of a police regulation immediately upon its enacment, only that in order to be effective it must be published. The enactment of August 31, 1894, was duly published on June 4, 1895, when it was officially *adopted* as legislation by the Commissioners, and thus the regulation in question was, it is submitted, duly enacted, promulgated and published.

The appellant further contends (Rec., p. 11) that the regulation is unconstitutional, null and void, because it prevents the free use by the public of a public street. The undisputed testimony (Rec., p. 18) is that the part of the street used by the railroad company as a right of way at the place of accident, was not, and could not be used by the public as a thoroughfare, or for the purpose of crossing from side to side, there being a gully three or four feet deep between the tracks, and a gully three inches deep on either side thereof. The contention of the appellant might be well taken if the public and the railroad company used the said right of way in common, as is the case with some steam railroads, which traverse cities, and use the city streets in common with the public in the same manner as the streets are used by the street railway companies and the public. In such case it would be manifestly improper to require or permit the railroad company to fence its right of way.

Indianapolis, etc., R. R. Co. *vs.* Warner, 35 Indiana, 516.

Louisville, etc., R. R. Co. *vs.* Francis, 58 Indiana, 389.

Rippe *vs.* Chicago, etc., R. R. Co., 42 Minn., 312.

But in a case like the one at bar where a roadway runs parallel to and at about the same grade as the railroad, the decisions uniformly hold that these fence regu-

lations are valid, and that they are a reasonable exercise of municipal regulation and control.

Ranson *vs.* Chicago, etc., R. Co., 62 Wis., 178.
Eaton *vs.* F. R. Co., 129 Mass., 364.
Hayes *vs.* M. C. R. R. Co., 111 U. S., 235.
Jefferson, Madison and Indianapolis R. R. Co. *vs.* Sweeney, 32 Indiana, 430.
Indianapolis and Cin. R. R. Co. *vs.* Guard, 24 Indiana, 222.
The Indianapolis & Cin. R. R. Co. *vs.* McKinney, 24 Ind., 283.
Ill. Central R. R. Co. *vs.* Trowbridge, 31 Ill. Appeals, 190.
Iowa Cent. R. R. Co. *vs.* Gushee, 49 Ill. Appeals, 609.

This identical fence regulation was before this court in the case of R. R. Co. *vs.* Cumberland, 12 Appeals D. C., 598, and was very carefully considered by the court in that case by Justice Morris who delivered the opinion of the court. On pages 604 and 605 of said opinion the court refers to and considers the regulation in its several phases, and it is submitted that if the regulation was invalid for want of authority to enact it; that it was an unreasonable exercise of municipal regulation, or that it had been repealed by implication and nonuser, or was unconstitutional as contended for by appellant, the court would have so decided. But the court in its opinion treats the ordinance as valid and refers on page 605 to the reason for its enactment, namely, "As a barrier against temptation to cross the tracks, which was the very thing against which the ordinance sought to guard."

Cooley on Torts, 2d Edition, pages 784–790.
American & English Enc. of Law, 2d Edition, vol. 12, pages 1065–1066–1073–1078–1080–1084.

II.

The second exception taken by appellant appears on page 18 of the record, and is based upon the refusal of the court to instruct the jury upon all the evidence, to return a verdict for the defendant.

The court properly refused to so instruct the jury as prayed.

When the facts are in dispute as they were in this case or when the undisputed facts are such that reasonable men may draw different conclusions from them, the question is not one of law for the court, but must be submitted to the jury.

Met. R. R. Co. *vs.* Hammett, 13 Appeals D. C., 370.
R. R. Co. *vs.* Powers, 149 U. S., 43.

III AND IV.

The third and fourth exceptions taken by appellant appear on pages 18 and 19 of the record, and are based upon the refusal of the court to grant defendant's prayers Nos. 3 and 3½ (Rec., pp. 18 and 19).

The court properly refused to grant these prayers for the reason that they fail to take into account or mention the failure of the appellant company to comply with the provisions of the fence regulation, which failure on its part was in itself negligence in law, as hereinafter more fully referred to in the sixth exception.

The question of the obligation of a railroad company to fence its tracks at any particular point or place, is one of law, not of fact, and should not be left to the jury to decide.

Ill. Central R. Co. *vs.* Whalen, 42 Ill., 396.

V.

The fifth exception of appellant is on page 19 of the record, and is to the refusal of the court to grant defendant's fourth prayer. This prayer was properly refused.

If granted the jury would be precluded from considering any element of damage, except what was necessary to repair the damaged wagon, whereas the undisputed testimony (Rec., pp. 14 and 15) is that in addition to repairs to the wagon the plaintiff paid for hospital treatment of the horse $43, and that for over four months after the accident the horse was unable to do any work, during part of which time the plaintiff hired a horse, paying therefor $1.50 per day, and that the plaintiff subsequently sold the injured horse for $90, and that the said horse, prior to the accident, was worth from $175 to $200.

VI.

The sixth exception of appellant is on page 22 of the record, and is to that part of the court's charge to the effect that, if the jury believed that the grade of the railroad tracks, and the adjacent street was approximately the same; that the tracks were unfenced; that the plaintiff was not guilty of contributory negligence, and that the failure of the defendant to comply with the provisions of the police regulation in question was the direct cause of the damage complained of, then as a matter of law the defendant was guilty of negligence, and their verdict should be for the plaintiff.

It is submitted that this part of the court's charge correctly states the law. There is an overwhelming weight of authority to the effect that the failure to observe the provisions of a law or municipal regulation is in itself negligence.

Gilman *vs.* European, etc., R. Co., 60 Maine, 235–244.
Crazzer *vs.* Taylor, 10 Gray (Mass.), 274.
Eaton *vs.* F. R. Co., 129 Mass., 364.
Ranson *vs.* Chicago, etc., Railway Co., 62 Wis., 178.
Hayes *vs.* Mich. Central R. R. Co., 111 U. S., 235.
Grand Trunk Railway Co. *vs.* Ives, 144 U. S., 408.

Railway Co. *vs.* McDonald, 152 U. S., 267–282.
Bark Shetland *vs.* Johnson, 21 Appeals D. C., 416.
Lindsey *vs.* Pa. R. R. Co., 26 Appeals D. C., 503.
Clements *vs.* Potomac Electric Power Co., 26 Appeals D. C., 482.

In the case last cited, this question is very carefully considered, and paragraph six of the syllabus as follows embodies the gist of the opinion on the point in question:

> "Where, in an action for personal injuries, the evidence shows that the defendant has neglected to comply with a municipal regulation, and that, without contributory negligence on the part of the plaintiff, such neglect directly caused the injury, negligence exists as a matter of law, and it is error to refuse to charge the jury to that effect."

VII.

The seventh exception of appellant is on page 2 of the record, and is to that portion of the court's charge to the effect, that if the jury found for the plaintiff they might include in their verdict—

> "damages for the loss, if any, sustained by the plaintiff in being deprived of the use of her mare during the time she was so far disabled by reason of her said injuries as not to be in a condition to be used and worked by the plaintiff."

The testimony in the case (Rec., p. 15) clearly shows, and it is not disputed, that for over four months after the accident the injured mare was unable, by reason of the injuries sustained, to do any work, and that the hire of a horse was $1.50 a day. This inability of the plaintiff to use her mare was certainly a proper element

of damage to be considered by the jury, and was one of the items of damage mentioned in the particulars of demand when the suit was instituted (Rec., p. 2).

It is respectfully submitted that in the light of all the evidence in this case, and the instructions of the trial justice, the facts and the law applicable thereto were fairly presented to the jury; that there was no error in the rulings of the court below, and that the judgment in this case should be affirmed.

Respectfully submitted.

P. R. HILLIARD,
Attorney for Appellee.